DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Computer III Further Remand	)	
Proceedings: Bell Operating Company	)	CC Docket No. 95-20
Provision of Enhanced Services	)	
	)	
1998 Biennial Regulatory Review --	)	
Review of *Computer III* and ONA	)	CC Docket No. 98-10
Safeguards and Requirements	)	

REPLY COMMENTS OF THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE

James S. Blaszak
Kevin DiLallo
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, N.W.
Suite 900
Washington, D.C. 20036
202-857-2550

Attorneys for Ad Hoc
Telecommunications Users
Committee

SUMMARY

The Ad Hoc Telecommunications Users Committee submits these Reply Comments in response to the initial comments filed in this proceeding. Although a broad cross-section of commenters agrees that the statutory term "information service" should encompass the services the Commission has defined as "enhanced services," a few commenters advocate an interpretation of "information service" that excludes services involving a net protocol conversion, without a change in the content of the information transmitted. The Commission should reject such an exclusion. Nothing in the language or legislative history of the Telecommunications Act of 1996 supports the proposed carve-out, and the Commission has already concluded that services involving a net protocol conversion are "information services."

The Commission should also reject the attempts by a few Bell Operating Company ("BOC") commenters to expand the scope of this proceeding to include a grant of broad regulatory relief for BOC provision of advanced telecommunications services under Section 706 of the 1996 Act or Section 11 of the Communications Act. Consideration of such requests for relief would be procedurally inappropriate in this proceeding, and the Commission is already considering similar requests for relief in other consolidated proceedings.

Similarly, the arguments of two commenters that the Commission should re-think its decision not to require information service providers ("ISPs") to pay interstate access charges is also procedurally inappropriate. That decision is currently being reviewed by the Court of Appeals for the Eighth Circuit; therefore,

backdoor requests for reconsideration of the decision are untimely and should be rejected.

The Commission should extend Section 251-like features, functionalities, and service arrangements to non-carriers, either under an expanded form of ONA or otherwise. But that alone would be insufficient to promote competition among ISPs unless incumbent local exchange carriers ("ILECs") are also required to provide non-carriers with unbundled, non-discriminatory access to the same advanced telecommunications features, functionalities, and service arrangements that the ILECs provide to their own ISP affiliates or any other party. A number of other commenters concurs in this recommendation. The Commission has the clear authority to impose this pro-competitive requirement, and nothing in Section 251 or elsewhere in the Communications Act suggests otherwise.

Non-carriers purchasing unbundled advanced telecommunications features, functionalities, and service arrangements under authority other than Section 251 should not be subjected to common carrier regulation.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services	)	CC Docket No. 95-20
	)	
1998 Biennial Regulatory Review -- Review of *Computer III* and ONA Safeguards and Requirements	)	CC Docket No. 98-10

REPLY COMMENTS OF THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE

The Ad Hoc Telecommunications Users Committee ("Ad Hoc" or the "Ad Hoc Committee") submits these Reply Comments in response to the comments that have been submitted on the Commission's Further Notice of Proposed Rulemaking ("Further Notice") in the referenced proceeding.[1]

I. SERVICES INVOLVING A NET PROTOCOL CONVERSION ARE INFORMATION, NOT TELECOMMUNICATIONS, SERVICES.

The arguments of a few Bell Operating Company ("BOC") commenters[2] that services involving a net protocol conversion, but with no change in the content of the information transmitted, should be treated as telecommunications,

---

[1] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, and *1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements,* CC Docket No. 98-10, Further Notice of Proposed Rulemaking, FCC 98-8 (released January 30, 1998).

[2] *See, e.g.,* Comments of US West, Inc. in CC Dkts. Nos. 95-20 and 98-10 (filed March 27, 1998) ("US West Comments") at 16-18; Comments of Bell Atlantic in CC Dkts. Nos. 95-20 and 98-10 (filed March 27, 1998) ("Bell Atlantic Comments") at 19-20.

rather than information, services under the Communications Act,[3] should be rejected on both substantive and procedural grounds.[4]

First, as a substantive matter, the Commission has already dismissed this position in the *BOC Non-Accounting Safeguards* Order,[5] where it affirmed that "protocol processing services that interpret and react to protocol information associated with the transmission of end-user content" fall within the definition of "information service."[6] The Commission

> reject[ed] Bell Atlantic's argument that "information services" only refers to services that transform or process the content of information transmitted by an end-user . . . . [T]he statutory definition makes no reference to the term "content," but requires only that an information service transform or process "information."[7]

Second, there is absolutely no support in the language or legislative history of the 1996 Telecommunications Act that would suggest that Congress intended that the definition of "information service" in the Act should be narrower

---

3 47 U.S.C. §§ 153(20) (defining "information service"), 153(43) (defining "telecommunications").

4 A broad cross-section of commenters disagrees with the assertion that the statutory definition of "information service" is somehow narrower than the Commission's definition of "enhanced service." *E.g.,* Comments of Ameritech in CC Dkts. Nos. 95-20 and 98-10 (filed March 27, 1998) ("Ameritech Comments") at 15; Comments of AT&T Corp. in CC Dkts. Nos. 95-20 and 98-10 (filed March 27, 1998) ("AT&T Comments") at 7-9; Comments of America Online, Inc. in CC Dkts. Nos. 95-20 and 98-10 (filed March 27, 1998) ("AOL Comments") at 5-7; Comments of the Information Technology Association of America in CC Dkts. Nos. 95-20 and 98-10 (filed March 27, 1998) ("ITAA Comments") at 3-8.

5 *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934,* CC Dkt. No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) at 21956.

6 *Id.*

7 *Id.*

than the Commission's definition of "enhanced service,"[8] which includes services involving net protocol conversions.[9]

US West's related request for relief from "CEI, waiver, or other regulatory requirements" when providing services involving protocol conversions[10] is not properly the subject of this proceeding and should be rejected. Moreover, because the Further Notice failed to provide adequate public notice of such a proposal, the Commission may not act on it.[11]

The Ad Hoc Committee endorses ITAA's general recommendation[12] that the Commission adopt the terms "information service" and "telecommunications" service from the 1996 Telecommunications Act, but that it use the descriptions of basic and enhanced services in its Rules[13] to describe the statutory terms.

II. BOC ARGUMENTS FOR BROAD DEREGULATION UNDER SECTION 706 OF THE 1996 TELECOMMUNICATIONS ACT AND SECTION 11 OF THE COMMUNICATIONS ACT ARE MISPLACED AND SHOULD NOT BE RAISED IN THIS PROCEEDING.

While the Commission has asked which, if any, of the ONA or CEI rules or other non-structural safeguards can be eliminated, certain BOC commenters are

---

8 47 C.F.R. § 64.702(a).

9 *Accord,* AT&T Comments at 8-9; AOL Comments at 6-7; ITAA Comments at 4-5; Ameritech Comments at 15 ("there is simply no basis to conclude that Congress intended a departure from the Commission's traditional usage of its basic/enhanced dichotomy").

10 US West Comments at 18.

11 *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-15 (1950) (adequate notice is "elementary and fundamental requirement of due process" in rulemaking proceedings); *see* 5 U.S.C. § 553(b).

12 ITAA Comments at 7-8. The Ad Hoc Committee takes no position with respect to the specific amendments ITAA has proposed to Section 64.702(a).

misusing this proceeding as a soapbox on which to proclaim a far broader de-regulatory agenda. For example, US West and Ameritech have suggested that their provision of advanced telecommunications services should be deregulated pursuant to Section 157 of the Communications Act,[14] as amended by Section 706 of the 1996 Telecommunications Act (hereinafter referred to as "Section 706").[15] This is not the appropriate proceeding to consider such relief.

Ameritech has attempted to fold into this proceeding the arguments it made for regulatory relief in its pending Petition under Section 706.[16] It argues that the ONA and CEI rules discourage BOC investment in the infrastructure needed to provide advanced telecommunications services; therefore, the Commission should abolish those rules under Section 706.[17] Ameritech claims that, if required to unbundle advanced capabilities and make them available to competitors under Section 251, and if such capabilities are subject to the ONA and CEI rules, the BOCs will be discouraged from investing in the construction of advanced services infrastructure.[18]

This hackneyed line of argument fails to consider the alternative: If the BOCs are allowed to provide their own ISP affiliates with unbundled, bottleneck

---

13 47 C.F.R. § 64.702(a).

14 47 U.S.C. § 157 note.

15 US West Comments at 7-9; Ameritech Comments at 12-14.

16 *Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability* (filed March 5, 1998).

17 Ameritech Comments at 13.

18 *Id.* at 13-14.

advanced functionalities and are not required to make them available on nondiscriminatory terms to others, the BOCs will score yet another advantage over other competing ISPs. The Commission should take preemptive action to prevent such a result.

US West's argument for deregulation is centered on its novel interpretation of Section 11 of the Communications Act,[19] namely, that it "establishes a statutory presumption that regulation is not necessary."[20] There is absolutely no statutory basis for this interpretation, nor does US West offer any support for it.

Moreover, although US West notes that Section 11 compels the Commission to eliminate any regulation that is no longer "necessary," it ignores two critical aspects of this requirement. First, Section 11 requires the elimination of regulations found to be unnecessary "*as the result of meaningful economic competition between providers of such service.*"[21] Second, US West sidesteps market realities, and makes no attempt to demonstrate the existence of "meaningful economic competition" in its markets that would warrant relief under Section 11. Indeed, there is no evidence that US West will face such competition in the near future, in any market in which it will be able to leverage its monopoly control over bottleneck facilities.

---

19 47 U.S.C. § 161.

20 US West Comments at 7.

21 47 U.S.C. § 161(a)(2) (emphasis added).

The Commission should reject the pleas by US West and Ameritech for broad regulatory relief.

III. ATTEMPTS EFFECTIVELY TO SEEK RECONSIDERATION OF THE COMMISSION'S DECISION REGARDING THE SO-CALLED "ESP EXEMPTION" ARE UNTIMELY AND PROCEDURALLY INAPPROPRIATE.

US West and Bell Atlantic have urged the Commission to rethink its decision in the *Access Charge Reform* proceeding[22] not to extend interstate access charges to information (*i.e.*, "enhanced") service providers ("ISPs" or "ESPs").[23] Bell Atlantic argues that the policy discourages incumbent local exchange carriers ("ILECs") from investing in advanced telecommunications services.[24] The Commission has already rejected this argument in the *Access Charge Reform* Order.[25]

US West claims that the so-called "ESP exemption" encourages entities that might otherwise be classified as telecommunications carriers to structure their service offerings so that they will be classified as ESPs, and thereby avoid paying interstate access charges.[26] To illustrate its point, US West points to the

---

22 *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing and End User Common Line Charges,* CC Dockets Nos. 96-262, 94-1, 91-213, and 95-72, First Report and Order, 12 FCC Rcd 15982, 16133 (released May 16, 1997) (subsequent history omitted).

23 US West Comments at 18-19; Bell Atlantic Comments at 17.

24 Bell Atlantic Comments at 17.

25 *Supra,* note 22, 12 FCC Rcd at 16134.

26 US West Comments at 18-19.

recent deployment of Internet Protocol- ("IP-") based telephony services.[27] The "solution," these commenters suggest, is for the Commission to require ESPs to pay interstate access charges.[28]

These arguments should be rejected as untimely and procedurally inappropriate. The Commission's decision to continue its policy of excusing ESPs from paying interstate access charges is currently under review by the U.S. Court of Appeals for the Eighth Circuit.[29] It would be improper for the Commission to act before the Court issues its decision on the matter. Furthermore, the Commission has already stated that it will consider the regulatory status of IP telephony services on the basis of records developed in future proceedings.[30] It is inappropriate to seek reconsideration of that decision in this proceeding.

IV. THE COMMISSION SHOULD GIVE NON-CARRIERS ACCESS TO NETWORK ELEMENTS, FUNCTIONALITIES, AND SERVICE ARRANGEMENTS SIMILAR TO, BUT BROADER THAN, THOSE AVAILABLE TO CARRIERS UNDER SECTION 251 WITHOUT IMPOSING COMMON CARRIER OBLIGATIONS.

In its initial Comments, the Ad Hoc Committee urged the Commission to make Section 251-like network elements, features, functionalities, and service

---

27 *Id.* at 19.

28 US West Comments at 18-19; Bell Atlantic Comments at 17.

29 *Southwestern Bell Telephone Co., et al. v. FCC,* Case No. 97-2618 (8th Cir., filed June 16, 1997).

30 *Federal-State Joint Board on Universal Service -- Report to Congress,* CC Dkt. No. 96-45, FCC 98-67 (released April 10, 1998), at ¶¶ 90-92.

arrangements available to non-carriers, either through an expanded form of ONA or otherwise. However, merely making Section 251-like network elements available to non-carriers, including ISPs, would be insufficient and inefficient for accomplishing the principal objective of ONA, *i.e.*, encouraging competition by independent ISPs. This is because Section 251 addresses primarily (if not exclusively) a circuit-switched voice network architecture, which is not the same architecture that will be used for data communications.

Even with Section 251, both voice and data services are provided over the same ILEC facilities, thus allowing ILECs to maintain their control over ISP access to customers that data CLECs[31] would like to serve. Moreover, if a data CLEC does not wish to provide voice local exchange service, it may practically be foreclosed from providing ISPs with a meaningful alternative to the ILECs for accessing the ISPs' customers.

A solution to this problem would be for the Commission to affirmatively require ILECs to provide both carriers and non-carriers the same advanced facilities, features, functionalities, and service arrangements that the ILECs provide to their own ISP affiliates or any other party on an unbundled, nondiscriminatory basis.[32] These offerings should include unbundled access at

---

[31] As used herein, a "data CLEC" is a competitive local exchange carrier or a competitive access provider that provides data transmission service, either alone or together with voice service.

[32] For example, if an ILEC offers sub-loop unbundling of DSL loops to its own ISP affiliate, it should be required to offer the same to independent parties on a nondiscriminatory basis. According to ITAA, ILECs are already using DSL service to discriminate against competing ISPs by offering DSL loops only to subscribers to the ILECs' own information services. ITAA Comments at 28.

ILEC switch locations to aggregated data from the ILECs' customers at cost-based, economically efficient rates. ISPs and end users that purchase this service should not be required to provide local exchange service, since they will not be carriers purchasing service pursuant to Section 251. This arrangement would relieve ISPs of their current need to collocate in every ILEC end office -- a practical need that has resulted from the Eighth Circuit's decision that ILECs are not required to re-assemble network elements.[33]

The foregoing proposal, which has been advanced in varying degrees of specificity by a number of other commenters,[34] could be adopted as part of a broader program in which the Commission would make Section 251-like features, functionalities, and service arrangements available to non-carriers. The broader program may be more suitable for some entities, while the more specific, data-oriented arrangement might be more suitable for others. The two complement, rather than conflict with, each other.[35]

The Commission has clear authority under Sections 4(i) and 202(a) of the Act to adopt the Ad Hoc Committee's and ITAA's proposals.[36] The arguments by

---

33 *Iowa Utilities Board v. FCC,* slip op. (October 14, 1997).

34 *E.g.,* MCI Comments at 68-69; ITAA Comments at 27-31; AOL Comments at 16-18.

35 MCI has similarly urged in its Comments that the Commission should make Section 251-like UNEs available to ISPs, *and* the Commission should impose the additional requirement that the BOCs must provide others with unbundled broadband facilities and functionalities on a nondiscriminatory basis MCI Comments at 68-69, 71-72.

36 47 U.S.C. §§ 154(i), 202(a); *see Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* Final Decision, 77 F.C.C.2d 384, 475 (1980) (subsequent history omitted); *Independent Data Communications Manufacturers Association -- Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service Is a Basic Service,* 10 FCC Rcd 13717 (1995) at 13719; *Competition in the Interstate Interexchange Marketplace,* CC Dkt. No. 90-132, FCC 95-2 (1995) at ¶ 40.

certain BOC commenters that Section 251's applicability only to telecommunications carriers indicates Congress' intention that such elements, features, and functionalities may *not* be made available to non-carriers[37] are unpersuasive.

Congress' objective in enacting Section 251 was to introduce competition to the ILECs' local exchange and interstate access markets; therefore, Section 251 is limited to telecommunications carriers desiring to compete in those markets. The fact that Section 251 does not refer to non-carriers is consistent with the section's purpose. It does *not* indicate that Congress sought to prevent non-carriers from obtaining access to Section 251-like features and functionalities. If Congress had such an intention, it would have made it explicit; but nothing in the 1996 Telecommunications Act provides even a hint of such an intention. Consequently, it is inappropriate to draw an inference from Section 251 that non-carriers are not entitled to Section 251-like features and functionalities.

If the Commission extends to non-carriers access to Section 251-like features, functionalities, and service arrangements, including unbundled advanced telecommunications features, functionalities, and service arrangements, such non-carriers should not be required to assume the burdensome responsibilities or regulatory cloak of common carriers. While Section 251 is limited to telecommunications carriers, the Commission need not

---

[37] *E.g.*, Comments of the United States Telephone Association in CC Dkts. Nos. 95-20 and 98-10 (filed March 27, 1998) ("USTA Comments") at 3-4; US West Comments at 24-25;

– indeed can not – provide the requested features and functionalities to non-carriers under Section 251. Free from the limitations of that section, the Commission may confer Section 251-like competitive benefits without imposing Section 251-like obligations.

CONCLUSION

For the foregoing reasons, the Ad Hoc Committee respectfully requests the Commission to retain and expand ONA to make Section 251-like features, functionalities, and service arrangements available to non-carriers, and to require ILECs that offer advanced telecommunications features, functionalities, and service arrangements to their own ISP affiliates or any other party to also make them available to all parties on a nondiscriminatory basis.

Respectfully submitted,

AD HOC TELECOMMUNICATIONS
USERS COMMITTEE

By: Kevin S. DiLallo

James S. Blaszak
Kevin DiLallo
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, N.W.
Suite 900
Washington, D.C. 20036
202-857-2550

April 23, 1998

Its Attorneys

200.01/COM CI III Reply 4-21-98

Comments of Bell South Corporation in CC Dkts. Nos. 95-20 and 98-10 (filed March 27, 1998) ("Bell South Comments") at 27-28.

Certificate of Service

I, Molly McEwan, hereby certify that true and correct copies of the preceding Reply Comments of the Ad Hoc Telecommunications Users Committee in CC Docket Nos. 95-20 and 98-10 were served this 23rd day of April, 1998 via hand delivery upon the following parties:

Janice Myles
Common Carrier Bureau
1919 M Street, NW
Room 544
Washington, DC 20554

ITS
1919 M Street, NW
Washington, DC 20554

Molly A. McEwan

April 23, 1998

200.01/certserv Reply Comments Computer III (04-23-98)